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No. 91-471

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; AND JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR THE PETITIONER

JAMES T. BANKS
JOHN T. VAN GESSEL
Chemical Waste Management, Inc.
3003 Butterfield Road
Oak Brook, Illinois 60521
(708) 218-1500

ANDREW J. PINCUS *
KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

DRAYTON PRUITT, JR.
Pruitt, Pruitt & Watkins, P.A.
Courthouse Square
P.O. Box 1037
Livingston, Alabama 35470
(205) 652-9627

FOURNIER J. GALE III
H. THOMAS WELLS, JR.
Maynard, Cooper, Frierson & Gale, P.C.
1901 Sixth Avenue, North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203
(205) 254-1000

Counsel for Petitioners

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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We showed in our certiorari petition that the Alabama Supreme Court's decision squarely conflicts with decisions of this Court and other federal and state courts and involves issues of great public importance. The amicus briefs filed by groups representing virtually all American manufacturers (American Iron & Steel Inst., et al. ("AISI")) and the entire waste disposal industry (Hazardous Waste Treatment Council, et al. ("HWTC")) confirm that the legal issue has tremendous practical ramifications and should be addressed now by this Court.

The federal government also has spoken out against state laws that discriminate against interstate commerce in hazardous waste. The Administrator of the Environmental Protection Agency recently stated in testimony before Congress that there is "a need for a national market for specialized treatment and disposal of hazardous waste. Therefore, we should not create any authorities that operate as a ban on interstate transport of either solid or hazardous waste, thereby inhibiting or restricting the development and use of the most appropriate technology for waste treatment or recycling." [1]

Respondent Sizemore nonetheless argues (Opp. 6-8) that, notwithstanding the flaws in the decision below and the confusion in the lower courts, this Court should deny certiorari and leave "the nation's waste disposal problems" for resolution by Congress. He appears to suggest that whenever there is a division among the lower courts on a legal issue that relates to "significant political issues of emerging importance," this Court should allow the uncertainty to fester in order to create a situation so intolerable that Congress is forced to act. While it is perhaps understandable that Alabama wishes

[1] Testimony of William K. Reilly before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works at 15 (Sept. 17, 1991). We have lodged with the Clerk of this Court a copy of the Administrator's written statement. (The transcript of the hearing at which he testified has not yet been released.)

to avoid review of the constitutionality of taxes that generated some $34 million during their first year in operation, this Court's responsibility is to declare "what the law is" in order to ensure the protection of federal rights, not to wait for Congress to act.

In any event, respondents have not cited any evidence that Congress is even considering legislation regarding interstate movement of hazardous waste.[2] The fact that Congress might someday choose to alter the governing rules provides no basis for leaving CWM—and interstate commerce as a whole (see AISI Am. Br.)—to suffer the burden of these blatantly unconstitutional taxes for the indefinite future.

Less than six months ago, Alabama, supported by a number of states as amici curiae, urged this Court to review the Eleventh Circuit's decision in the *NSWMA* case on the ground that the scope of the states' power to discriminate against out-of-state waste raised "important questions of Federal constitutional law which should be settled by this Court." 90-1718 Pet. 8 (footnote omitted). The Court denied certiorari, presumably because there was then no conflict among the lower courts. Now that the Alabama Supreme Court has created a conflict, the issue is ripe for review by this Court.

A. The Facially Discriminatory $72 Tax

Alabama's $72 Additional Fee discriminates on its face against interstate commerce. As we discussed in the pe-

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[2] The bill cited by respondent Sizemore (Opp. 7 n.3) concerns only interstate movements of solid waste, not hazardous waste. Indeed, Senator Chafee, one of the sponsors of the bill, has stated that states should not be permitted to adopt measures that discriminate against interstate commerce in hazardous waste because "[s]uch restrictions * * * are simply bad environmental policy." Cong. Rec. S5283 (daily ed. Apr. 25, 1991).

Moreover, Congress already has addressed the problems cited by Sizemore, adopting a statute that encourages states to authorize construction of additional hazardous waste disposal facilities. 42 U.S.C. § 9604(c)(9); see also *NSWMA*, 910 F.2d at 716-717, 721 (discussing purpose and effect of this provision).

tition (at 11-17), the Alabama Supreme Court's decision upholding that tax conflicts with this Court's decision in *City of Philadelphia* and with decisions of four federal courts of appeals. A fifth federal court of appeals has since held that the Commerce Clause invalidates state laws that facially discriminate against disposal of waste generated in other states. *Hazardous Waste Treatment Council* v. *South Carolina*, 1991 WL 183687 (4th Cir. Sept. 20, 1991).

Respondent Sizemore contends (Opp. 11-13 & n.5) that there is no conflict, but his distinctions are irrelevant because they have nothing to do with the grounds of the Alabama Supreme Court's ruling. For example, Sizemore intimates (Opp. 11-12) that the constitutional flaw in the statute struck down in *NSWMA* was that it distinguished *among* interstate waste. But that statute should have been upheld if respondents are correct in their view that states may discriminate against interstate commerce as long as the legislature's motivation is to protect public health. See Pet. 16.

Instead, the Eleventh Circuit squarely rejected Alabama's argument that *Maine* v. *Taylor* limits *City of Philadelphia* and held the statute unconstitutional because it "does not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation." 910 F.2d at 721. Alabama sought certiorari on the ground that the Eleventh Circuit had interpreted *Taylor* too narrowly and *City of Philadelphia* too broadly (see 90-1718 Pet. 12-14, 16-17). Thus, in the State's own view, *NSWMA* would have been decided in the State's favor if the Eleventh Circuit had adopted the legal theory subsequently embraced by the Alabama Supreme Court. The conflict between the two decisions is undeniable.

Respondent Sizemore's attempt to distinguish the Fourth Circuit's recent decision (Opp. 12 n.5) is similarly flawed. That court did not base its decision on the particular nature of the discrimination against interstate commerce,

but on *City of Philadelphia*'s principle that a state may not distinguish among waste based on state of origin alone. 1991 WL 183687 at *9-*10. That is the precise principle found inapplicable by the Alabama Supreme Court.[3]

Indeed, even respondent Sizemore is forced to concede that the decisions of the Fourth and Eleventh Circuits "may indicate an interpretation of" *City of Philadelphia* and *Taylor* different from that of the Alabama Supreme Court. Opp. 12 n.5; *id.* at 12. This Court should grant certiorari to resolve this clear dispute about the meaning of these two important decisions.

On the merits, respondents' defense of the $72 tax is insupportable. As we discuss in the petition (at 12-13), respondents' argument is undercut by the plain language of *City of Philadelphia*, language that respondents cannot explain and therefore simply ignore. Certainly respondents' out-of-context quotations from *Taylor* and other cases (Sizemore Opp. 9-10) cannot obscure this Court's repeated affirmation that the strict Commerce Clause standard applicable to facially discriminatory state laws motivated by economic protectionism "also [applies] to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate

[3] Respondents' distinctions (Sizemore Opp. 12 n.5; Hunt Opp. 14-15 & n.13) of the other federal court decisions are similarly unpersuasive. The fact that the other decisions did not involve statutes identical to those at issue here is irrelevant because those courts interpreted *City of Philadelphia* in a manner that squarely conflicts with the Alabama Supreme Court's decision in this case. Moreover, the Seventh and Ninth Circuits held the state laws at issue invalid under the Commerce Clause, in addition to being preempted by federal law.

Respondent Hunt places great weight on the fact that the Alabama Supreme Court reached its decision after a trial. But, as we discuss below, the facts developed at trial are wholly irrelevant to the legal issue. Indeed, *NSWMA* was decided on a summary judgment record that included many of the "facts" now advanced by respondents to justify the Alabama Supreme Court's decision. See 729 F. Supp. at 797-799.

trade." *Taylor*, 477 U.S. at 148 n.19 (citing *City of Philadelphia* as an example of such a case).

Respondents' contention (Sizemore Opp. 13 n.6) that *Taylor* and the "quarantine cases" apply here is similarly mistaken. The Additional Fee is a tax, not a quarantine, and, because the trial court found that there is no difference between Alabama waste and interstate waste, the fee cannot be justified under *Taylor*. See Pet. 14 n.6.

Finally, respondents place great emphasis on the risks from the transportation and disposal of hazardous waste at CWM's Emelle facility that allegedly are established by the factual record in this case. Hunt Opp. 13-14. Even if all of these assertions were true, and they are not,[4] they are insufficient as a matter of law to justify taxing waste generated in other states at a rate higher than waste generated in Alabama. *Respondents cite no evidence—and there is none—to contradict the trial court's finding (Pet. App. 86a) that a ton of non-Alabama waste presents risks no different from a ton of Alabama waste.* Thus, while respondents' risks might provide the basis for imposing an evenhanded per-ton tax on disposal of all waste in Alabama, they cannot justify Alabama's blatant facial discrimination against interstate commerce. See Pet. 13-14.[5]

[4] Respondent Hunt's entire argument rests on the premise that current federal and state regulations are inadequate to protect the public.

[5] A per-ton tax would take account of the fact that most of the waste disposed of at the Emelle facility is generated in other states: interstate waste would bear the greater share of the tax because there is more of it.

Respondent Hunt asserts (Opp. 13) that Alabama must collect extra funds from out-of-state waste generators now, because it will not be able to reach them in the event that there is a discharge of waste from the Emelle facility sometime in the future. But federal law makes *all* generators liable in perpetuity for the costs of remediating any such discharge. See 42 U.S.C. § 9607(a). The location of the generator's business is irrelevant to this obligation. 42 U.S.C. § 9613(a).

B. The $25.60 Tax

Respondents do not dispute that discrimination against interstate commerce can be accomplished without a facially discriminatory statute. Nor do they seriously dispute that there is considerable confusion among the lower courts about the standard for deciding when a facially neutral law's practical effect or the motivation for the law's enactment require that the law be treated for Commerce Clause purposes as the equivalent of a facially discriminatory measure. See Pet. 25-27. Respondents instead argue that certiorari should not be granted with respect to this issue because (1) laws that distinguish between "commercial" and "noncommercial" activities can never violate the Commerce Clause, and (2) the record in this case demonstrates that the Base Fee does not discriminate against interstate commerce in its practical effect.

Of course, the Alabama Supreme Court did not rest its decision on either of these grounds. It simply concluded that the Base Fee does not violate the Commerce Clause because it is facially nondiscriminatory. Pet. 23. Respondents make little effort to defend that perfunctory approach. The question, therefore, is whether respondents' arguments make this case an inappropriate vehicle for resolving how courts should go about determining whether facially neutral measures in fact discriminate against interstate commerce.

1. In considering respondents' attempt to elevate the commercial/noncommercial distinction into a constitutional safe harbor, it is important to note that the Base Fee does not tax all businesses and exempt only charitable activities; some businesses are exempt from the tax. Moreover, the Base Fee does not tax all arm's length transactions and exempt all intracorporate dealings. Disposing for pay of a single pound of hazardous waste renders a disposal site wholly "commercial" and makes *all* disposal at that site subject to the tax, regardless of whether the other disposal transactions are commercial or noncommercial. Because disposal facilities located on manufacturing sites are classified as noncommercial and dispose exclusively of Alabama waste (the waste generated by that manufacturing facility), while "commercial" disposal sites dispose of virtually all of the interstate waste disposed of in Alabama, this classification plainly can operate as a proxy to effectuate discrimination against interstate commerce.

Respondents have offered no reason why such a classification should not be evaluated under the standard that applies generally to determine whether a neutral measure discriminates against interstate commerce in effect. This Court's cases instruct that it is the substance of state legislation, not its form, that matters for Commerce Clause purposes. *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 294-296 (1987). Where *any* statutory classification may serve as a proxy for distinguishing interstate from intrastate commerce, and imposing a heavier burden on the former, it should be reviewed with the same critical eye.[6]

Respondent Sizemore asserts (Opp. 16) that, in the absence of the safe harbor he proposes, the states will be precluded from taxing most commercial activities. That concern is preposterous. Only in cases in which a disproportionate percentage of the taxed activity is interstate in nature and a disproportionate percentage of the exempt activity is intrastate in nature would strict scrutiny possibly apply. Even if there were such a disparity, the tax would be invalid only if there were a less

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[6] Can there be any doubt, for example, that if a state were to impose a highway user tax on vehicles used to haul products for hire, but not on vehicles used "noncommercially" to haul the operator's own products, strict scrutiny would be appropriate if it turned out that, as a result of the distinction, the tax fell disproportionately on trucks engaged in interstate commerce? Yet that is exactly what Alabama has done here by exempting from a disposal tax all waste that is disposed of at captive disposal facilities.

discriminatory means of achieving the purposes of the legislation.[7]

2. Respondents also contend that review is not warranted because the facts of this case establish that the Base Fee does not discriminate against interstate commerce in its practical effect. Sizemore Opp. 3-5, 18; Hunt Opp. 18-19 & n.18. Of course, neither of the courts below considered that question. And respondents do not dispute that the Base Fee was motivated by an intent to discriminate against interstate commerce, a factor that this Court has accorded great significance in determining whether to subject a neutral statute to more searching scrutiny. See Pet. 22 n.12. Moreover, because it is not clear what standard applies in evaluating a claim that a facially neutral statute discriminates against interstate commerce in purpose and effect, it is impossible to determine which side the record supports.

In any event, respondents' evaluation of the record is in error. Respondents contend that, for purposes of determining whether the Base Fee discriminates in its practical effect, the only relevant waste is landfilled waste and that most Alabama waste that is landfilled is subject to the Base Fee. However, the Base Fee applies not just to landfilling, but to all forms of "disposal," a term that is defined very broadly in the statute (see Pet. 19). This definition by its plain terms encompasses the full range of activities qualifying as "disposal," including treatment or storage of any hazardous waste (including wastewater) in a manner that does not preclude its entering the environment or being discharged into the waters of the State. Indeed, it was undisputed at trial that the disposal fee is being paid by the operator of a hazardous waste incinerator. Tr. 392, 409-410. By the

[7] Respondent Sizemore worries (Opp. 16 n.10) that failure to adopt his proposed *per se* rule would force the Court to engage in linedrawing. Because the lower courts have been struggling with these issues for many years (see cases cited at Pet. 25-27), that is a reason for granting certiorari, not for denying it.

same token, surface impoundments and waste piles plainly fall within the definition of "disposal."

If Alabama waste stored or treated in surface impoundments and waste piles is included in the calculation, as the statute's own definition of "disposal" clearly requires, the exemption for noncommercial facilities has the effect of exempting 99% of in-state waste from the Base Fee.[8] That result is precisely the kind that courts outside of Alabama have found more than sufficient to categorize the state law as discriminatory in effect.

Respondent Hunt takes a different tack, arguing (Opp. 16-17) that Alabama's exemption of noncommercial facilities is justified because such facilities do not manage the same volumes of waste as commercial facilities and therefore do not involve the same degree of risk. Ironically, Hunt himself points out (*id.* at 16 n.14) that only commercial facilities are "subject to rigorous" regulation and does not dispute the testimony of his own witness that the Emelle facility is safer than noncommercial facilities (see Pet. 19 n.10). What is more, he utterly fails to come to grips with the fundamental flaw in his argument: a per-ton tax like the Base Fee already fully takes into account the asserted fact that greater amounts of waste result in a greater degree of risk. See Pet. 19-20 n.11.

Finally, respondent Hunt is quite mistaken in suggesting (Opp. 19) that if Alabama is not permitted to restrict the Base Fee to commercial facilities it will be unable to achieve its environmental objectives. A per-ton fee on all waste disposed of in Alabama would achieve the State's objectives *more* effectively than the existing discriminatory fee. It is only the *illegitimate* objective of discouraging the importation of waste that an even-handed fee would fail to achieve.

[8] Even excluding the 690,000 tons of wastewater that respondent Sizemore asserts no longer are generated (Opp. 3), 98% of the waste generated and disposed of in Alabama is exempt from the Base Fee.

C. The Cap Provision

Respondents do not dispute our submission (Pet. 27) that invalidation of either or both of the fees at issue in this case would require invalidation of the Cap Provision.[9] Respondents do attempt to answer our other challenges to the Cap Provision, asserting that courts have approved annual limitations on the amount of waste that may be disposed of at a waste disposal facility. Sizemore Opp. 19-21; Hunt Opp. 21. But we do not challenge annual limits in general. The question here is the discriminatory manner in which the limit has been imposed in Alabama, discrimination identical to that embodied in the two fees. As to that claim, respondents are silent.

Respondent Hunt asserts (Opp. 21-22) that the exception to the Cap Provision does not facially discriminate against out-of-state waste because Alabama could invoke that exception to meet its contractual obligation to provide disposal capacity for certain kinds of waste generated outside the State. This argument was never made to either of the lower courts. But interpreting the Cap Provision's exception as a reciprocity provision between Alabama and certain other states simply confirms that the provision is facially discriminatory: this Court has long held such provisions invalid on that ground. See, *e.g.*, *Limbach*, 486 U.S. at 273. Indeed, it was precisely that kind of selective discrimination that was struck down in *NSWMA*. See 910 F.2d at 719-721. Respondents' eleventh-hour argument thus only confirms the need for review of this question.

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[9] Respondent Hunt points to an article discussing CWM's revenues (Opp. 20 n.20), claiming that it shows that the decline in the amount of waste disposed of at the Emelle facility was caused by factors other than the challenged taxes. The draconian effect of those taxes is demonstrated by the fact that disposal volumes dropped 63% at the Emelle facility for the first half of 1991, an amount much greater than the decline in first quarter revenues cited by Hunt. The participation in this litigation of representatives of most of the Nation's waste generators shows that CWM's customers believe that Alabama's taxes are what is obstructing the flow of interstate commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES T. BANKS
JOHN T. VAN GESSEL
Chemical Waste Management, Inc.
3003 Butterfield Road
Oak Brook, Illinois 60521
(708) 218-1500

DRAYTON PRUITT, JR.
Pruitt, Pruitt & Watkins, P.A.
Courthouse Square
P.O. Box 1037
Livingston, Alabama 35470
(205) 652-9627

ANDREW J. PINCUS *
KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

FOURNIER J. GALE III
H. THOMAS WELLS, JR.
Maynard, Cooper, Frierson & Gale, P.C.
1901 Sixth Avenue, North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203
(205) 254-1000

Counsel for Petitioners

OCTOBER 1991

* *Counsel of Record*